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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY LEE JACKS,

Defendant and Appellant.

D074573

(Super. Ct. No. 16CR006004)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Ronald M. Christianson, Judge. Affirmed and remanded with directions.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Seth M. Friedman, for Plaintiff and Respondent.

Defendant and appellant Larry Lee Jacks was convicted of second degree robbery and multiple prior convictions were found true. He contends on appeal that the trial court abused its discretion in denying his motion for new trial. He argues that his defense

counsel was ineffective in failing to raise a mental status defense and also in failing to declare a doubt about Jacks's competence to stand trial. We disagree.

BACKGROUND

Cynthia C. went gambling at the San Manuel Casino in Highland on March 21, 2016. She left the casino with about \$1,200 that she redeemed from a cash machine. She put the money in an envelope in her purse and walked to her car in the parking lot, shortly after midnight. Jacks followed her out of the casino and grabbed her purse as Cynthia C. was opening her car door. Cynthia C. resisted. She screamed for help and held onto her purse while Jacks forcefully tried to wrest it away. He eventually succeeded. He threw the purse on the ground and its contents spilled out. Jacks found the envelope with cash and ran toward a parking structure.

A security guard arrived and ordered Jacks to stop. Jacks ran. The security officer tried to cut him off, but Jacks saw the officer, changed direction, and ran a zig-zag pattern into the parking structure. The security guard found Jacks underneath a car in the garage. There was a stack of cash under the car and some in Jacks's pocket. The money was returned to Cynthia C. Surveillance video showed Jacks following Cynthia C. from the cash redemption machine out of the casino to her car, robbing her, running to a garage, and crawling out from under a car.

A jury convicted Jacks of second degree robbery. (Pen. Code, § 211.)¹ The jury also found true that Jacks had three prior strike convictions (§§ 667, subds. (b)-(i),

¹ Further statutory references are to the Penal Code unless otherwise specified.

1170.12, subds. (a)-(d)), three prior serious felony convictions (§ 667, subd. (a)(1)), and two prior prison convictions (§ 667.5, subds. (a), (b)). The court struck the prior prison term enhancements and sentenced Jacks to a term of 40 years to life in prison—25 years to life under the Three Strikes law and consecutive five-year terms for each of the three prior serious felony convictions. Jacks filed a timely notice of appeal.

DISCUSSION

I. New Trial Motion

Jacks contends that the trial court erred in denying a motion for new trial that was based on ineffective assistance of counsel. Jacks argues that his attorney failed to adequately investigate before deciding not to declare a doubt as to Jacks's competence to stand trial and before deciding not to use a mental state defense. We affirm the trial court's ruling.

A. Background

We provide a detailed description of the court proceedings to show the information that was known to the trial court when it denied the motion for new trial.

Jacks was disruptive from the start, before the jury trial commenced. He personally argued to the court during in limine motions that he was neither arraigned nor given a preliminary hearing in a timely manner. He was taken out of the courtroom briefly. The bailiff heard Jacks say that he did not want to be in the courtroom and he would be violent in the courtroom. Jacks said he wanted to change his plea to not guilty by reason of insanity (NGI). He changed his mind when he was told a delay of three

weeks would be necessary to appoint experts to examine him. He said he would instead work on a habeas corpus petition for violation of his due process.

Jacks tainted the first voir dire panel by telling the prospective jurors that this was a three-strike case, "they" wanted to give him a sentence of 28 years to life and would not permit him to plead not guilty by reason of insanity, and the deputy district attorney was trying to "railroad" him. The jury panel was excused, and a new panel brought in.

Jacks said that he did not want to be present during trial. He was excused from the courtroom on June 21, 2016. Jacks confirmed on June 23 and on June 27 that he did not want to be present through trial. On June 27, the trial court advised Jacks of his right to testify and asked if he wanted to testify. Jacks claimed he did not understand his right to testify and told the court, "I don't even know what a trial is right now. [¶] . . . [¶] I don't understand what testifying means. I'm incompetent right now. I don't understand." The court found that Jacks was "not being honest or sincere in saying to the court that [Jacks did not] understand all of a sudden. That is a ruse to attempt to build in further issues on appeal."

After Jacks was found guilty, a new attorney was appointed for him and he moved for a new trial. Jacks argued that he was not competent to stand trial, and that his attorney was constitutionally ineffective for failing to declare a doubt as to Jacks's competency and failing to consult and call an expert on Jacks's mental status. Jacks provided a declaration from a forensic psychologist who conducted an evaluation eight months after trial. The psychologist reported that Jacks was alert, oriented, polite, and cooperative during the interview. His thought processes were logical and organized.

Jacks told the psychologist that he had been diagnosed with schizophrenia, paranoid type. The psychologist concluded that Jacks was competent at the time he interviewed him, but that it was more likely than not that Jacks was not competent to be tried at the time of his trial.

The trial court held an evidentiary hearing. Jacks's two prior attorneys testified. Both had years of criminal defense experience. Both thought that Jacks was "a little hard to get along with" but that he understood the proceedings and was able to assist them. As his trial attorney put it, Jacks *could* help him but *would* not help him. The testimony of both attorneys showed that Jacks was well aware of court proceedings and able to assist counsel.

Trial counsel also testified that he had represented defendants with schizophrenia. Jacks did not display any of the symptoms common to defendants with schizophrenia. Counsel did not pursue an insanity defense because he did not think it would be successful. The videos of the robbery showed purposeful, rational action by Jacks. Counsel knew that Jacks told the police he thought he was George Bush, but he believed this was obstructionist behavior rather than lack of sanity.

The psychologist testified that he accepted Jacks's statements as true and did not verify them. He opined that Jacks had paranoid schizophrenia based solely on Jacks's word, without reviewing his medical records. Jacks displayed no symptoms of schizophrenia when the psychologist interviewed him. The psychologist thought that Jacks also had antisocial personality traits. The psychologist opined that Jacks was competent at the time that the psychologist interviewed him.

The psychologist did not review the trial transcript except for the small snippet in which Jacks said he did not want to be present at trial, he did not know what testifying was or what a trial was, and that he was incompetent. The psychologist accepted Jacks's statements as true in concluding that Jacks might have been incompetent at the time of trial. Based on those statements, and Jacks's ability to remember and understand prior proceedings, the psychologist extrapolated that Jacks would have behaved differently—less disruptively—if he had been competent at the time of the June 2016 trial. The psychologist did not evaluate Jacks for sanity at the time of the crime.

The trial court denied the motion. It rejected the psychologist's retrospective opinion. The court relied on the following facts. Jacks exhibited a detailed knowledge of criminal procedure in two *Marsden*² motions and in letters to his attorney. He was represented by experienced counsel and none of them declared a doubt about his competency. He absented himself from trial for a strategic reason—he thought he could not be identified if not present. The trial court observed Jacks in court and had several personal interactions with him. Nothing suggested Jacks was incompetent to stand trial. His actions showed not incompetence "but the conduct of a defendant who is going to try anything he could to disrupt the court process so he would not be convicted," the court said. Trial counsel's testimony corroborated the court's opinion. The court found that when Jacks said he did not understand what testifying meant, he "was feigning his lack of understanding. This was merely another attempt to disrupt the process." Further, Jacks

² *People v. Marsden* (1970) 2 Cal.3d 118.

told the probation officer that he had no recollection of the robbery. The court found that "Jacks was feigning that lack of memory to continue disruption of the process." The court said it had been handling criminal cases for over 20 years and based on its observations and interactions, Jacks was competent to stand trial. The court concluded that defense counsel was not ineffective in failing to declare a doubt about Jacks's competency. Further, the court noted the evidence of guilt was overwhelming because it was all recorded on surveillance video.

B. Applicable Law

1. Motion for New Trial

Ineffective assistance of counsel is not one of the enumerated grounds for granting a motion for a new trial in section 1181, but a trial court can and should review this claim when the court's own observation of the trial supplies a basis for the court to act expeditiously on the motion. (*People v. Watts* (2018) 22 Cal.App.5th 102, 117–118 (*Watts*).) " '[J]ustice is expedited when the issue of counsel's effectiveness can be resolved promptly at the trial level.' " [Citation.]" (*Id.* at p. 117; *People v. Carrasco* (2014) 59 Cal.4th 924, 981 (*Carrasco*).)

We employ a two-step process to review the denial of a motion for new trial based on purported ineffective assistance of counsel. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724–725.) We review the trial court's express or implied factual findings for substantial evidence, applying all presumptions in favor of the trial court's exercise of its power to judge witness credibility, resolve conflicts in testimony, weigh the evidence, and draw factual inferences. (*Id.* at p. 724.) We review de novo its determination

whether, on the facts as found, the defendant has shown his or her trial counsel was ineffective or to show he suffered prejudice as a result of counsel's alleged failings. (*Id.* at pp. 724–725.) "To the extent that these are questions of law, the appellate court is not bound by the substantial evidence rule, but has ' "the ultimate responsibility . . . to measure the facts, as found by the trier, against the constitutional standard.'" [Citation.] On that issue, in short, the appellate court exercises its independent judgment.' " (*Id.* at p. 725.)

A defendant who appeals from the denial of a new trial motion generally forfeits those claims not raised in the new trial motion. (*Carrasco, supra*, 59 Cal.4th at p. 981; *People v. Verdugo* (2010) 50 Cal.4th 263, 309.)

2. Ineffective Assistance of Counsel

" ' "To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citation.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [*Strickland*].)" ' [Citation.]" (*People v. Rices* (2017) 4 Cal.5th 49, 80.) "In reviewing a claim of ineffective assistance of counsel, we give great deference to counsel's tactical decisions." (*People v. Johnson* (2015) 60 Cal.4th 966, 980 (*Johnson*).) We presume that counsel's performance fell within the wide range of professional competence unless the defendant shows otherwise. (*People v.*

Lopez (2008) 42 Cal.4th 960, 966 (*Lopez*.) The defendant bears the burden of showing both the ineffectiveness of counsel and the prejudice it caused. (*Ibid.*)

Defense counsel has a duty to investigate in order to make informed legal and professional decisions. We give deference to counsel's strategic choices about which lines of defense to pursue. " '[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial.' " (*Strickland, supra*, 466 U.S. at p. 681.) The defendant has the burden of presenting evidence showing what information could have been discovered and showing that the additional information would have created a reasonable probability, not just a possibility, of a more favorable result. (*Carrasco, supra*, 59 Cal.4th at p. 991; *In re Welch* (2015) 61 Cal.4th 489, 521 (*Welch*.)

C. Competence at Trial

1. Legal Principles

A defendant has a right not to be tried or convicted while he is mentally incompetent. (*People v. Lewis* (2008) 43 Cal.4th 415, 524, disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919–920; *Drope v. Missouri* (1975) 420 U.S. 162, 171.) A defendant is presumed mentally competent unless he proves otherwise by a preponderance of the evidence. (§ 1369, subd. (f); *People v. Blacksher* (2011) 52 Cal.4th 769, 797 (*Blacksher*.) He is not competent to stand trial if he "is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a); *In re Sims* (2018) 27 Cal.App.5th 195,

208 (*Sims*); *Drope v. Missouri*, at p. 171.) Evidence of incompetency must be substantial, that is, evidence that raises a reasonable doubt about the defendant's ability to stand trial. (*Sims*, at p. 208.)

2. Discussion

Defense counsel's decision not to investigate Jacks's competency and not to declare a doubt as to his competency was reasonable. The record supports the facts found by the trial court regarding Jacks's competency to stand trial. Jacks had comprehensive knowledge of criminal procedure and an understanding of the charges against him. He knew, for example, that this was a three-strike case and that he would be imprisoned for more than 25 years to life if convicted.

The trial court observed Jacks in court and had several personal interactions with him. It found nothing that suggested Jacks was incompetent to stand trial. The court said that Jacks's actions showed "the conduct of a defendant who is going to try anything he could to disrupt the court process so he would not be convicted." We give great weight to the trial court's assessment of competency because the trial court had the opportunity to observe the defendant through the course of the proceedings. (*People v. Mai* (2013) 57 Cal.4th 986, 1033.) " "An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper." ' [Citations.]" (*Ibid.*)

The psychologist opined that Jacks was likely incompetent to stand trial based in part on Jacks's statements during trial that he did not know what a trial or testimony were. The trial court, however, found that Jacks was not credible when he made those

comments and they were just a ruse. We accept the trial court's credibility determination. (*Verdugo, supra*, 50 Cal.4th at p. 308.) The trial court had a better vantage point than the psychologist and made a contemporaneous determination rather than the psychologist's after-the-fact guessing at Jacks's mental state eight months earlier. The other contemporaneous witnesses, Jacks's two defense attorneys, reached the same conclusion as the trial court.

Jacks also claims that he had schizophrenia but has provided no evidence supporting that other than his self-serving statements to the psychologist. The psychologist accepted Jacks's statements as true without looking at his medical records or otherwise verifying Jacks's assertion. Self-serving statements lack credibility. (See *People v. Smith* (2017) 12 Cal.App.5th 766, 800.) Jacks did not exhibit any symptoms of schizophrenia in court or when interviewed by the psychologist. A diagnosis of schizophrenia, by itself, does not show that a defendant is incompetent. (See *People v. Miranda* (2015) 236 Cal.App.4th 978, 989–990 [defendant with both schizophrenia and bipolar disorder competent to represent himself].)

Based on the facts in the record, we conclude that defense counsel's performance was not deficient. Two other experienced attorneys³ represented Jacks without declaring a doubt as to his competency, showing that trial counsel acted within prevailing professional norms. (*Strickland, supra*, 466 U.S. at p. 688.) Defense counsel's tactical

³ A third attorney from the Inland Defenders Conflict Panel represented Jacks at the preliminary hearing and did not declare a doubt as to Jacks's competency. He did not testify at the new trial hearing.

choice not to investigate Jacks's competence further was reasonable, based on the record before us. (See *id.* at p. 681.) His decision not to declare a doubt as to Jacks's competence was also reasonable under the totality of the circumstances. (*Ibid.*; *Johnson, supra*, 60 Cal.4th at p. 980.) Jacks has not overcome the presumption that defense counsel's performance fell within the wide range of professional competence. (*Lopez, supra*, 42 Cal.4th at p. 966.)

Further, Jacks has not shown prejudice. He has produced no evidence of a reasonable probability that he could have been found incompetent to stand trial. (*Carrasco, supra*, 59 Cal.4th at p. 991; *Welch, supra*, 61 Cal.4th at p. 521.) The psychologist's report, based on Jacks's self-serving statements, is not convincing. The psychologist was not reasonably certain about his opinion. He thought it only more likely than not that Jacks was incompetent at trial. Jacks's behavior throughout the trial shows that he was experienced with the court system and understood the proceedings despite his guileful attempts to show otherwise.

D. *NGI Defense*

Jacks contends that defense counsel was ineffective in failing to investigate or pursue an NGI defense based on his mental state at the time of the robbery. We disagree.

1. Legal Principles

"It is fundamental to our system of jurisprudence that a person cannot be convicted for acts performed while insane." (*People v. Kelly* (1973) 10 Cal.3d 565, 574.) A defendant may claim legal insanity as an affirmative defense to a criminal charge. (*People v. Hernandez* (2000) 22 Cal.4th 512, 522; § 25, subd. (b).) A defendant is legally insane if he "was incapable of knowing or understanding the nature and quality of the criminal act, or of distinguishing right from wrong." (*People v. Mills* (2012) 55 Cal.4th 663, 671; § 25, subd. (b).) It is presumed that a defendant is sane. (*Blacksher, supra*, 52 Cal.4th at p. 831.) The defendant bears the burden of proving, by a preponderance of the evidence, that he was legally insane when he committed the crime. (Evid. Code, §§ 115, 522; *Mills*, at p. 672.) A defendant might be sane for purposes of criminal law even if he has a diagnosable mental illness. (*Mills*, at p. 672.)

2. Discussion

Before trial commenced, defense counsel made a tactical decision not to enter a plea of NGI for Jacks because the surveillance video showed that Jacks's actions in robbing Cynthia C. were purposeful and deliberate. Also, Jacks was not cooperative in agreeing to a continuance of the trial in order to have doctors evaluate him.

Jacks told the court at the beginning of trial that he wanted to change his plea to NGI. He changed his mind, however, when he was told that the trial would be delayed in order to appoint two doctors to evaluate him. Jacks refused to change his plea unless he could start trial that day.

We agree with defense counsel that Jacks's actions in committing the robbery showed that he knew and understood the nature and quality of his criminal act. He knew that his actions were wrong because he ran from the security guard and hid under a car to avoid detection. (See *Mills, supra*, 55 Cal.4th at p. 671.) In *Welch*, the Supreme Court concluded that the defendant's behavior on the night of the crime showed that he "had the presence of mind to plan and carry out the [crime] and to appreciate the criminal nature of his conduct." (*Welch, supra*, 61 Cal.4th at p. 520.) The same is true here. Defense counsel made a reasonable tactical decision not to pursue the defense of insanity.

Moreover, Jacks has not met the basic criteria for this claim because he has not provided any testimony or evidence about his mental state at the time of the robbery. (*Carrasco, supra*, 59 Cal.4th at p. 991.) The defendant must establish the nature and relevance of the evidence that counsel failed to present or discover. (*Ibid.*; *Welch, supra*, 61 Cal.4th at p. 521.) The psychologist had no opinion about Jacks's mental state at the time of the robbery. Further, we accept the trial court's finding that Jacks was not truthful when he said he could not remember his actions at the time of the robbery.

We conclude that Jacks has shown neither deficient performance nor prejudice from counsel's strategic decision not to present an insanity defense.

II. Remand for Exercise of Sentencing Discretion

The jury found three serious felony prior convictions (§ 667, subd. (a)) true. Imposition of a five-year enhancement for each true conviction was mandatory at the time of sentencing. The trial court imposed an additional 15 years on Jacks's prison term for these enhancements.

The law has subsequently changed, giving trial courts discretion to impose, strike or dismiss those serious felony prior convictions for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2 [amending §§ 667, subd. (a) & 1385, subd. (b), effective Jan. 1, 2019].) Jacks filed a supplemental brief contending that these new amendments apply to this pending case. The People concede this issue and we agree. (*People v. Garcia* (2018) 28 Cal.App.5th 961 (*Garcia*) [these amended statutes apply retroactively to cases not yet final on appeal]; *In re Estrada* (1965) 63 Cal.2d 740, 744–745 (*Estrada*).)

The People argue that remand is not necessary because the trial court "clearly indicated" it would not have stricken the enhancements in any event. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*) [remand required unless trial court "clearly indicated" that it would not strike firearm enhancement].) We disagree and leave this discretionary decision to the trial court. The trial court found Jacks was not "outside the spirit of the three-strikes law." But it struck the enhancements for the prison priors. We cannot say with confidence that the trial court would choose not to strike some or all of the five-year enhancements for prior serious felony convictions.

III. *Mental Disorder Diversion*

We granted leave to Jacks to file a second supplemental brief regarding the applicability of a new law permitting diversion for defendants with certain mental

disorders. Jacks claims the law is retroactive and applicable to him. The People contend that the Legislature intended prospective application only. We conclude that the law is retroactive and applicable to all cases not yet final. In this particular case, however, the record clearly indicates that Jacks was not suffering from a mental disorder when he committed the crime, so remand would be futile.

Sections 1001.35 and 1001.36, which took effect on June 27, 2018, authorize pretrial diversion for defendants with mental disorders. (Stats. 2018, ch. 34, § 24.)

" '[P]retrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment. . . ." (§ 1001.36, subd. (c).)

A court may grant pretrial diversion under section 1001.36 if the court finds: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and the defendant waives the defendant's speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if the defendant is treated in the community. (§ 1001.36, subd. (b).) The defendant bears the burden of making a prima facie showing that he will meet the minimum eligibility requirements for diversion. (§ 1001.36, subd. (b)(3).)

The Supreme Court has said that it is an "inevitable inference" that the Legislature intends that new statutes imposing a lighter penalty should apply to every case in which the judgment is not yet final. (*Lara, supra*, 4 Cal.5th at p. 307; *Estrada, supra*, 63 Cal.2d at p. 745.) The *Estrada* rule applies to section 1001.36 because section 1001.36 lessens punishment by giving defendants the possibility of diversion and dismissal of criminal charges. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 791, rev. granted Dec. 27, 2018, S252220.) Section 1001.36 by its terms applies at any point in a prosecution from accusation to adjudication. (§ 1001.36, subd. (c).) Applying section 1001.36 retroactively is consistent with the statute's purpose, which is to promote "[i]ncreased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety." (§ 1001.35, subd. (a).) We conclude section 1001.36 applies retroactively to nonfinal cases like this one.

We determine, however, that this record clearly shows no basis for mental disorder diversion for Jacks. (See *McDaniels, supra*, 22 Cal.App.5th at pp. 425–427.) We recognize the high bar that must be met to make this decision in the first instance because the trial court had no opportunity to consider diversion when it heard the case. (*Ibid.*) The record here meets this high standard. Jacks's actions were caught on surveillance cameras and showed purposeful, goal-directed behavior at every step. Significantly, his attorney, an experienced criminal defense attorney, came to the conclusion that a mental status defense would not prevail. There was no evidence of a mental disorder other than Jacks's statements to the psychologist that he had been diagnosed with schizophrenia. None of the people who interacted with Jacks—the judge, experienced attorneys, and the

psychologist—saw any signs of schizophrenia. We conclude there is no likelihood the trial court would find Jacks suffered from an identified mental disorder or that a mental disorder played a significant role in the commission of the robbery. (§ 1001.36, subds. (b)(1)(A) & (B).) Therefore, we deny Jacks's request that this case be remanded for the trial court to determine if he were eligible for mental disorder diversion.

DISPOSITION

We remand with directions to the trial court to exercise its discretion with regard to the three prior serious felony enhancements, to amend the abstract of judgment if necessary and to forward the abstract, if it is amended, to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.